No. 80-323

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COLUMBIA BROADCASTING SYSTEM, INC.,

Petitioner,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS and PUBLISHERS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE*, AND BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., AS *AMICUS CURIAE*, IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PHILIP R. FORLENZA
Attorney for American Broadcasting Companies, Inc., Amicus Curiae
67 Wall Street
New York, New York 10005
(212) 952-4700

Of Counsel:

RAFAEL PASTOR
HAWKINS, DELAFIELD & WOOD
New York, New York

September 26, 1980

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MOTION OF AMERICAN BROADCASTING COMPANIES, INC. FOR LEAVE TO FILE A BRIEF, *AMICUS CURIAE,* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

American Broadcasting Companies, Inc. ("ABC") hereby moves for leave to file the annexed brief, *amicus curiae,* in support of the petition of CBS, Inc. ("CBS") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

ABC operates a nationwide television network. In the course of its business, ABC obtains, for programs offered by the ABC television network, blanket licenses from ASCAP and BMI for the non-dramatic perform-

ance rights to music in their repertories. In 1979, as in previous years, ABC paid ASCAP and BMI several million dollars for blanket licenses to use their respective pools o musical compositions. As the Court of Appeals found, the relevant market involved in this case is the licensing of music performance rights to the television networks—including, of course, ABC.

Hence, ABC was directly interested in and is affected by the prior decisions of this Court and of the Court of Appeals concerning the lawfulness, under the antitrust laws, of the licensing practices of ASCAP and BMI with respect to the television networks, and ABC respectfully urges that CBS' present petition for a writ of certiorari should be granted. ABC's briefs, *amicus curiae,* were previously submitted to this Court in this case and to the Court of Appeals on the ensuing remand. Accordingly, ABC requests permission to file the annexed brief, *amicus curiae,* in support of the petition for a writ of certiorari.

Dated: New York, New York
September 26, 1980

Respectfully submitted,

PHILIP R. FORLENZA
Attorney for American Broadcasting Companies, Inc., Amicus Curiae
67 Wall Street
New York, New York 10005
(212) 952-4700

Of Counsel:

RAFAEL PASTOR
HAWKINS, DELAFIELD & WOOD
New York, New York

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF AMERICAN BROADCASTING COMPANIES, INC., AS *AMICUS CURIAE,* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

American Broadcasting Companies, Inc. ("ABC") submits this brief, *amicus curiae,* in support of the petition of CBS, Inc. ("CBS") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Interest of the *Amicus Curiae*

ABC operates a nationwide television network. Like CBS, ABC obtains most of its television programming from independent production companies; the remainder it produces itself. Historically, ABC has acquired music performance rights necessary to exhibit that programming from ASCAP and BMI, which have issued only all-or-nothing blanket licenses substantially identical to those obtained by CBS and described in the prior decisions in this case. The blanket licenses from ASCAP and BMI have covered every musical composition in the ASCAP and BMI repertories; the corresponding license fees charged by ASCAP and BMI for music used under the blanket licenses have borne no relationship to the actual use made of ASCAP and BMI music under the blanket licenses.* Under this system, price competition in the licensing of performance rights for music used on ABC has been eliminated.

As a licensee of music performance rights, ABC has a direct and substantial interest in this case and, more particularly, in any decision that would remove the restraints which ASCAP and BMI place on price competition in the licensing of music performance rights for network television. In short, ABC has a significant stake in this case. For, as the Court of Appeals here found, the relevant market involved in this case is the licensing of music performance rights to the television networks—including, of course, ABC. That Court held that all sellers of music performance rights for television network use may agree upon the prices at which they will sell in one form of transaction, so long as that form of

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* The amount of those fees has been substantial. In 1979, as in previous years, ABC paid ASCAP and BMI several million dollars for blanket licenses to use their respective pools of musical compositions.

transaction is avoidable by the buyer because it is not exclusive. ABC is obviously affected by that decision. The decision, we submit, is erroneous, presents a seriously troubling precedent in antitrust law generally, commits an act of injustice to similarly situated buyers in the television industry and elsewhere, and should, at the very least, be reviewed by this Court.

Argument

The Court of Appeals decision condoned a blanket licensing system whereby ASCAP and BMI members and affiliates agree to receive $1,000 for every television network feature use of music. The basis of the decision was that this agreement among hundreds of sellers would have no anticompetitive effect at all on any prices negotiated directly between ASCAP and BMI members and affiliates, on the one hand, and networks or independent packagers of network programs, on the other hand.

ABC submits this brief, *amicus curiae,* to emphasize that what makes the decision of the Court of Appeals particularly inexplicable is that the price-stabilization effect of the agreed-upon $1,000-a-use agreement on any direct licensing prices is not only an economically obvious proposition but, in fact, such a price-stabilization effect was openly and repeatedly admitted by ASCAP and BMI in testimony and briefs.* Indeed, the Department of Justice acknowledged to the Court of Appeals that the ASCAP-BMI fee schedules

> "would have a direct impact on the price of compositions in a direct licensing market . . . since the product—a single composition—is the same."**

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* *See* CBS' present petition for a writ of certiorari, at 23 n. 21.

** Appendix to CBS' present petition for a writ of certiorari, at H-23 n. 19.

That the Court of Appeals disregarded this crucial point in its legal analysis does not remove it from the facts of this case.

We, therefore, submit that, because the Court of Appeals holding of no restraint flies in the face of facts and admissions manifestly demonstrating the opposite, as well as for the reasons set forth in CBS' present petition, including the conflict presented by the holding below to the prior decision of this Court, the grant of certiorari here is fully warranted.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
September 26, 1980

Respectfully submitted,

PHILIP R. FORLENZA
Attorney for American Broadcasting Companies, Inc., Amicus Curiae
67 Wall Street
New York, New York 10005
(212) 952-4700

Of Counsel:

RAFAEL PASTOR
HAWKINS, DELAFIELD & WOOD
New York, New York